U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: JULY 18, 1988

CASE NO. 87-INA-615

IN THE MATTER OF

EXXON CHEMICAL COMPANY
Employer

on behalf of

GHAZI BASHIER MOURAD DICKAKIAN
Alien

Appearances

KENNETH J. HARDER, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Fath, Levin, and Tureck, Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER EN BANC ON RECONSIDERATION

On January 25, 1988, a three-judge panel of this Board affirmed the Final Determination of the Certifying Officer (C.O.) denying the Employer's application for alien labor certification for the job of research associate - chemical lab chief. By letter to the Chief Judge, dated February 11, 1988, and by motion dated February 25, 1988, the Employer seeks reconsideration, including an en banc hearing with oral argument.

Upon consideration of the Employer's arguments, and a review of the Administrative File (AF), we find that this case must be remanded to the Certifying Officer (C.O.).

We agree with the Employer's argument that the C.O. failed to comply with the labor certification regulations that he state the reasons for his findings in the Notice of Findings and Final Determination. 20 C.F.R. §656.25(c)(2) and (g)(2)(ii). The C.O.'s bare conclusion in the Notice of Findings (AF 57), reiterated in the Final Determination (AF 18), that there were qualified and available U.S. workers who were improperly rejected is insufficient to give the Employer notice of the grounds for denial and fair opportunity to rebut or cure. In the Matter of

Downey Orthopedic Medical Group, 87-INA-674, (March 14, 1988). This is especially true in the context of this case, wherein the C.O. erred in the Notice of Findings in believing that the Employer's requirement (in the Application Form ETA 750-A) that applicants show evidence of the ability to obtain patents in carbon chemistry research was unduly restrictive.

Moreover, there is no indication in the Final Determination of the extent, if any, of the C.O.'s consideration of the Employer's detailed rebuttal (AF 20-55) to the Notice of Findings. The cursory reference in the Final Determination that the Employer failed to substantiate the reasons for rejecting U.S. workers is inadequate to disclose the reasons why the C.O. believes this to be so. The Final Determination is also vague on which other defects in the Notice of Findings the C.O. finds not to have been rebutted or cured, and why not. If, on remand, the C.O. again decides to include these other defects as reasons for denial, he shall better specify his asserted grounds in a new Notice of Findings.

The C.O.'s Refusal to Reconsider his Final Determination (AF 19) adds insufficiently little elucidation to his reasoning. The C.O. may have been trying to say that the Employer's rejection of U.S. workers because they did not previously obtain patents in carbon chemistry research goes beyond the requirement stated in the ETA 750-A, as supported by the Dictionary of Occupational Titles. If this had been the only basis for the Employer's rejection of U.S. workers, we would affirm the C.O.[1] However, the Employer argues that for the other reasons stated in its rebuttal none of the five U.S. applicants were qualified for the position, that one of them (Mr. Johnson) in any event stated at the time of the recruitment interview that he was no longer interested because he had accepted another job, and that another applicant (Mr. Tucker) had agreed at the interview that the job opportunity did not fit his background. The C.O. has shown no investigation or consideration of these arguments in concluding that there are qualified and available U.S. workers.

For the above reasons, on reconsideration we remand this case to the C.O. for him to consider the Employer's rebuttal and arguments before this Board. If the C.O. again decides to deny certification, he shall issue a new Notice of Findings which states the specific bases for his decision, giving the Employer an opportunity to rebut or cure the findings in compliance with section 656.25(c). If, after opportunity for rebuttal or cure, the C.O. again denies labor certification, his Final Determination shall state the reasons, including why he rejects any rebuttal or attempt to cure by the Employer.

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[1] The Employer's requirement that an applicant "show evidence of ability to obtain patent for carbon chemistry research'" (ETA 750-A Application) was reasonable in view of the description in the Dictionary of Occupational Titles (D.O.T.) that a chemical laboratory chief: "May advise and assist in obtaining patents . . . " However, the C.O. was correct in his June 12, 1987 Refusal to Reconsider his Final Determination (AF 19), that it was improper for the Employer, as stated in its rebuttal, to have concluded that applicants had failed to demonstrate the ability, if hired, to obtain such patents in the future solely because they had not previously obtained patents in carbon chemistry research.

We remind the C.O., and the Employer, that U.S. applicants do not have to match the alien's qualifications in order to be qualified for the job. Whether a U.S. applicant is qualified for a job must be determined on the basis of the minimum requirements specified in the labor certification application, In the Matter of Warren Moeller Drywall, 87-INA-645 (Feb. 26, 1988), provided those specified requirements, in the absence of special circumstances, do not exceed the normal minimum requirements for the job. In the Matter of Screen Actors Guild, Inc., 87-INA-626 (March 9, 1988).

ORDER

On reconsideration, the Decision and Order in this case issued on January 25, 1988 is VACATED. This case is REMANDED to the Certifying Officer for actions consistent with this Decision. The Employer's motion for oral hearing en banc of the now vacated Decision and Order is denied.

For the Board

LAWRENCE BRENNER
Administrative Law Judge

JUDGE LAWRENCE BRENNER, concurring separately:

While I, of course, fully concur in the Board's opinion as I have drafted it above, insofar as it goes, I wish to point out that the C.O. has an additional option on this remand because of the Employer's position before us. The C.O.'s further consideration of the Employer's rebuttal and arguments before this Board may lead the C.O. to consider whether he has misclassified the job. The Employer argues before us that the C.O. overrated the ability of the U.S. applicants to satisfy the job requirements because the C.O. did not consider the Employer's view that this is not an ordinary chemical lab chief job. In view of the Employer's arguments before this Board on the specialized multiple job requirements, the asserted importance to Exxon of the research laboratory which the selected applicant will head, as well as the importance of the work to "research scientists and academicians throughout the world'" and to "the momentum of technological research and innovation in the U.S. carbon chemistry industry'", the C.O. may find he needs more information to determine whether there is merit in the Employer's argument that, in effect, the C.O.'s assigned job classification is improperly too junior.

LAWRENCE BRENNER
Administrative Law Judge

LB/gaf

Administrative Law Judge Fath dissenting:

The original decision of the Board affirming the Certifying Officer's denial of certification was a correct disposition of this application for labor certification. Contrary to the findings of the Board in vacating that decision, I see nothing in the employer's brief to justify such a radical change in the Board's rationale. The evidence in file clearly shows that the employer rejected U. S. applicants for non-job related reasons in violation of 20 CFR 656.21(b)(7). The methodology seen in the history of this application for labor certification is designed to hire the alien to the exclusion of U.S. workers. A more expansive view of the facts will show that the Certifying Officer's reasons for denial were not satisfactorily rebutted.

A comparison between the job requirements and some of the applicants' resumes appears to support the employer's rejections, but only in part. Some of the applicants are not qualified for the job by training or experience, but some are highly trained and experienced experts in the field of chemistry research.

Applicant Kenneth W. Tucker has a masters degree in organic chemistry with a B+ average from the University of Tennessee. Among other things, his experience includes: four years of research in graphitization technology; three years of research of petroleum chemicals with emphasis on automotive lubricants. AF 78. He has published ten papers for the American Carbon Society in fields of graphite processing and characterization, coking technology and special aluminum cell cathodes. His resume lists ten U. S. patents (by numbers) and he claims several foreign patents. The employer rejected Tucker because he has no experience in research dealing with how carbons are formed, he lacks experience in laboratory analysis methods, and he has no patents in carbon chemistry research. Moreover, the employer stated that Tucker acknowledged that the job opportunity does not fit his particular background.

Applicant Charles G. Scouten has a doctorate in organic chemistry from Purdue University. He lists 34 publications in professional journals. He documents 6 U.S. patents on a variety of subjects in his field. He states in his resume that his research interests are: "Physical Organic Chemistry, Organic Synthesis, Main-Group Organometallics, Laboratory Automation and Robotics, Nuclear Magnetic Resonance, chromatography'". Since 1978 he has been employed by Exxon in research into the molecular structure of organic material in oil shales and petroleum rocks. He participated in an Exxon study on coking.

Scouten was rejected by the employer: he does not have four years in the job offered, nor the five years alternate experience; he lacks experience in electron-scanning microscopy; he has no patents in carbon chemistry.

Applicant Richard E. Pabst has a doctorate in physical chemistsry from Rice University. He has been employed by Exxon since 1977 in its Shale Research, Coal Gasification, and Analytical Research Laboratories. Mr. Pabst lists numerous publications, presentations, and reports on fuels. He has skills in analytical methods: Nuclear Magnetic Resonance, Mass Spectrometry, Scanning Electron Microscopy, and laboratory automation/computerization. The employer found Pabst unqualified: his doctorate is in physical rather than organic chemistry; he has skills in some analytical methods, but lacks experience in gel permutation, and

chromatography; he also lacks the four years experience in carbon formation from petroleum and experience in determining how carbons are formed in the refinery process.[1]

Applicant Lawrence B. Ebert has a doctorate in physical chemistry from Stanford University where he maintained a grade point average of 3.93 out of 4.0 possible. (His grade point average was 3.97 out of a possible 4.0. in acquiring his bachelor's degree at the University of Chicago.) He has a long list of publications, which includes articles on graphite, carbon, nuclear magnetic Resonance, and Chemistry of Engine Combustion Deposits, Plenum Press, New York, 1985. As his areas of interest, he notes carbonaceous materials, and magnetic resonance and x-ray diffraction. He has two patents, but not in carbon chemistry. Mr. Ebert was found unqualified: he does not have four years in the job offered; his concentration is in physical rather than organic chemistry; and, he has no patents in carbon chemistry.

At the time of his interview, Richard A. Johnson informed the employer that he had just accepted a new position and was not interested in the job offered. Nonetheless, the employer offered an assessment of this applicant: he was found unqualified for lack of experience in characterization and mechanism studies of carbon formation from petroleum. While this applicant was not available for the job, his impressive background is worth noting for its bearing on his qualifications for the position. Doctor Johnson has a doctorate in organic chemistry from the Massachusetts Institute of Technology. His resume shows experience in oil, coal, fuel combustion, and carbon research. He has been issued four patents, and he has eight papers in The Journal of the American Chemical Society and The Journal of Organic Chemistry.

The employer places great importance on the need for an ability to obtain patents in carbon chemistry. In its rebuttal, Exxon stated:

> This letter, in the form of a sworn statement that can be admitted as documentary evidence constitutes reconfirmation of our previous letter with special emphasis on our special requirement that applicants show evidence of ability to obtain patents for carbon chemistry research. We required no less from Dr. Dickakian, who had obtained 220 (sic) patents worldwide in carbon chemistry prior to being hired for his position.

AF 32. In a letter filed with the Certifying Officer in support of the application for labor certification, the employer stated: "While working in Linden, New Jersey and Greenville, South Carolina, Dr. Dickakian obtained 37 patents in carbon chemical research in the U.S. and while in Brussels, he obtained 15 patents in the same field'".

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[1] The employer and the alien refer to "gel permutation'" throughout their presentation. The scientific literature describes this analytic method as "gel permeation chromotography'". AF 53.

In his undocumented statement of qualifications, the alien claims a number of patents:

> Invented twenty-two company patents for synthesizing carbonaceous liquid crystals used as feedstock in production of low cost, petroleum derived carbon fibers.
>
> Invented twelve company patents for new processes used in production of carbon black for tires, carbon anodes for electrolysis of a minimum and graphite for electrolysis of iron ore into steel.

ETA 750-B. However, the alien has not obtained patents in his present job. He has merely assisted the company in obtaining patents. ETA 750 B.

In its en banc presentation, the employer reiterated the position it pressed in the application, rebuttal, and brief on appeal, but with more emphasis: "No U.S. worker who applied for the job opportunity had the education or experience required to successfully and consistently produce patentable innovations in carbon chemistry'" (emphasis added). It underscored the importance of this labor certification to Exxon: "Should Exxon Chemical Company be unable to obtain the work authorization needed for the alien qualified worker who is available, it will be compelled to relocate its research facility out of the U.S.'".

One of the United States applicants for the position had the following to say about Exxon's recruitment for the job:

> This position was not, to my knowledge, posted at Exxon's Clinton, New Jersey site, where I was employed until July 31, 1986. Thus, my knowledge of this position is incomplete and largely secondhand, being pieced together from information in the advertisement, additional information supplied by TEC and information from other sources within Exxon. However, it is my understanding that this position is at the Stedman Street Plant of Exxon Chemicals in Houston, Texas. Moreover, it is my understanding Exxon has already decided to fill this position by promoting a foreign national now working at Stedman Street, while at the same time firing thousands, including highly qualified US citizens such as myself, from other locations. This would be illegal, as well as unfair to those of us denied a fair chance at this desirable position.

AF 6.

Exxon had every opportunity to make its case on rebuttal. Though directed by the Certifying Officer to repost the offer, it refused on the grounds that reposting would be burdensome. It refused a direction to interview some of the applicants for the reason none was qualified. To the suggestion by the Certifying Officer that it seek candidates for the job among its recently discharged employees, it said none was qualified. The animus of the employer

throughout this proceeding is reflected in its en banc brief; either the alien is certified or the plant is closed.

It is clear to me that the employer rejected qualified United States workers for reasons unrelated to the job. And, it is equally clear that the job opportunity was not open to United States workers.

George A. Fath
Administrative Law Judge

Stuart A. Levin, Administrative Law Judge, Dissenting.

It is not without considerable reluctance that I take issue with my colleagues' determination to vacate the decision issued on January 25, 1988 by a panel of this Board. Exxon Chemical Co., 87-INA-615, (January 25, 1988). Indeed, it may be noted that the Board en banc does not identify the error it believes the original panel presumably committed.[1]

Yet, the decision of the panel, as shall be demonstrated, is essentially correct. Equally important, in overturning the panel decision, the Board now lurches back upon the regulation relied upon by the panel, and published by the Secretary at 20 CFR §656.21 (b)(7).

Section 656.21(b)(7) provides:

> If U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons.

By way of background, the decision of January 25, 1988, upheld the determination of the Certifying Officer in his rejection of the employer's insistence that applicants for the job of research associate have carbon chemistry patents in order to "demonstrate the ability to obtain patents'" in carbon chemistry research. Exxon, panel decision, supra at 3 (emphasis in original).

Both the Certifying Officer and the original panel concluded that the Employer had rejected U.S. applicants who had failed to satisfy its patent requirements and that such requirements were unduly restrictive under Section 656.21(b)(2). Both the Certifying Officer and the panel, therefore, concluded that U.S. applicants were rejected for "unlawful non-job related reasons in violation of Section 656.21(b)(7).'" Exxon, panel decision, supra at 4.

Upon en banc review, the Board reaffirms the conclusion that U.S. workers were improperly evaluated in respect to their ability to obtain patents. It veers sharply away from the original panel and reverses course, however, when it asserts, "if this had been the only basis for the employer's rejection of U.S. workers, we would affirm the C.O.'" Thus, the majority, without mentioning Section 656.21(b)(7), parts company not only with the previous panel decision in this matter, but with the express language of the regulation.

What merits concern in all this is not merely the ad hoc procedures employed here in overturning a sound panel decision, but the basic policy turn reflected by this appeal. Thus, the majority has affirmatively determined to withdraw consideration of Section 656.21(b)(7) under circumstances in which U.S. applicants are rejected by an employer, but not "solely for lawful

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[1] The original panel decision was rendered by Judges Brenner, DeGregorio, and Tureck. They now join in the en banc decision vacating that decision.

job-related reasons."[2] Consequently, an unlawful recruitment effort, which the majority acknowledges used impermissible applicant screening criteria, may now be regarded as consistent with the regulatory admonition set forth in Section 656.21(b)(7).

In its reversal of the panel, the Board transforms a regulatory provision intended by the Secretary of Labor as a shield to protect the U.S. workforce into a sword against U.S. job applicants. Under such circumstances, I must remain somewhat dubious about endorsing the interpretative alchemy through which the Board synthesizes outcomes of this type.

STUART A. LEVIN
Administrative Law Judge

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[2] The Board has decided numerous cases under 20 CFR §656.21(b)(7). None of the cases, however, are contrary to the original panel decision, and none provide justification for reversing the panel decision in this matter. Nor did the employer, in its petition for en banc reconsideration, discuss or cite any cases addressing Section 656.21(b)(7). Thus, left unstated by the Board is the rationale which prompted the deletion of any reference to Section 656.21(b)(7) from its decision vacating the panel's reliance upon that provision. Perhaps, the Board's rationale will eventually emerge, post hoc, ergo propter hoc, in future cases.